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Supreme Court of the United States

OCTOBER TERM, 1951

No. .....

W. E. MOSS, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF LEON S. HORNE AND NELL HORNE, DOING BUSINESS AS STAR CITY LUMBER COMPANY ..... *Petitioner,*

vs.

W. D. MAY ..... *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

PETITION

MAY IT PLEASE THE COURT:

Your Petitioner, W. E. Moss, Trustee in Bankruptcy of the Estate of Leon S. Horne and Nell Horne, doing business as Star City Lumber Company, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in this cause on February 5, 1952, reversing a judgment of the District Court of the United States for the Eastern District of Arkansas, Western Division.

STATEMENT OF MATTERS INVOLVED

This is a proceeding brought by Petitioner in the District Court to construe a special warranty deed to be a mortgage. During the course of the trial Petitioner and the original defendant, H. J. Mosser, entered into a consent decree under the terms of which it was agreed that title

to the lands in controversy be vested in Petitioner and a lien be fixed upon the lands in the amount of Mosser's debt. For the purposes of this petition the facts alleged are, therefore, not in dispute.

Subsequent to bankruptcy, Mosser and the Respondent entered into an oral agreement, under the terms of which Mosser agreed to sell the lands in controversy to the Respondent. Subsequent to the institution of this proceedings, and after filing of notice of *lis pendens,* Mosser and Respondent entered into a written contract. After the trial had commenced in the District Court, without prior notice, Respondent orally petitioned and secured permission to intervene. The written intervention prayed only that Petitioner be required to comply with the terms of said contract. Petitioner objected to the allowance of the intervention. Thereafter, Mosser, Petitioner and Respondent entered into a consent decree under the terms of which the title to the lands in controversy was vested in Petitioner, a lien was fixed on the property representing Mosser's debt and Petitioner was directed to perform as the vendor under the terms of the contract in the place and stead of Mosser. Respondent was granted thirty days in which to conclude the purchase. Upon his default, over Petitioner's objections, the District Court granted Respondent an additional ten days in which to perform. When Respondent defaulted the second time, Respondent and Petitioner without authority of the Bankruptcy Court, entered into a new consent decree to which Mosser was not a party, under the terms of which the time to perform was further enlarged. A provision was incorporated in the decree that in the event of a further default, Respondent would ask for no additional extension. The Respondent defaulted under the terms of this decree. Over Petitioner's objections, the District Court granted Respondent additional time.

The Respondent executed a mortgage upon the lands involved belonging to Petitioner, secured the money necessary, and made a tender of the purchase price. Upon the tender being refused, the Respondent made an unconditional tender to the Clerk of the District Court. Upon further proceedings before the District Court. that Court held it was without jurisdiction to allow the interven-

tion at the time it was filed and entered a decree dismissing Respondent's intervention, reaffirmed title to the lands in Petitioner, subject to the lien of Mosser, and provided for the withdrawal of the tender made by the Respondent and also a tender previously made by Petitioner representing moneys which the Respondent had paid to Petitioner under the terms of the consent decrees. All orders and decrees theretofore entered by the District Court were set aside. Respondent filed Notice of Appeal from this decree. Several days later, Respondent petitioned the District Court for authority to withdraw both tenders, "without prejudice to his right to prosecute his appeal." An order to this effect was entered on the same day the petition was filed. After the record was filed in the Court of Appeals, Petitioner filed a Motion to Dismiss on the grounds (1), that the questions presented on appeal are moot; (2), that it appears from the face of the record neither the District Court nor the Court of Appeals had jurisdiction over the subject-matter; and (3), that the appeal is not from the final order. The motion was denied without prejudice to the right to renew the same in connection with consideration of the issues presented on appeal. The motion was renewed upon submission of the case to the Court of Appeals.

The Court of Appeals reversed the judgment of the District Court and refused to pass upon the questions presented in the Motion to Dismiss. In substance, the Court of Appeals held, when the action was brought the lands in controversy were in the possession of Mosser, an adverse claimant; that the District Court had jurisdiction and, having jurisdiction, the court had the power to enter the consent decree vesting the title to the lands in controversy in Petitioner subject to the lien in favor of Mosser and to Mosser's obligation to convey the lands to Respondent; that the intervention of Respondent and the various orders extending Respondent's time to complete the purchase from the Petitioner were within the Court's discretion, while at the same time holding that a consent judgment having the same force and effect of any other judgment cannot be modified or altered in any essential part without the consent of the parties.

Petitioner contends all issues between himself and the defendant, Mosser, were settled by the consent decree and all parties are bound thereby; that the decree could not be altered or modified in any essential part without the consent of all parties. The question pertaining to possession or an adverse claimant was settled by the consent decree and was not passed upon by the District Court, nor was it raised in the Specification of Points relied on upon appeal. The Court of Appeals could not, therefore, pass upon these questions of its own motion. The findings of fact and conclusions of law filed by the District Court are unchallenged and must stand. Petitioner further contends, in the alternative, if the consent decrees could be altered and modified without the consent of all parties, he was without authority to waive the jurisdiction of the court of bankruptcy by entering into a consent decree with Respondent. Petitioner further contends the intervention was contrary to the provisions of Rule 24 of the Rules of Civil Procedure; that the District Court was correct in holding that Courts of Bankruptcy are separate and distinct from all other Federal Courts and their jurisdiction is exclusive; that the District Court was correct in finding that the lands passed into the custody of the Bankruptcy Court upon the filing of the petition, subject only to the lien of Mosser. The matters thus presented involve questions of whether or not a court of plenary jurisdiction may usurp the jurisdiction of a Bankruptcy Court; interpretation of Sections 67 and 70 of the Bankruptcy Act; interpretation of the provisions of Rule 24 of the Civil Rules of Procedure and whether or not the Court may alter a consent decree in an essential part over the protest of one of the parties.

JURISDICTIONAL STATEMENT

The petition was filed in the United States District Court for the Eastern District of Arkansas, Western Division, under the provisions of Sections 67 and 70 of the National Bankruptcy Act as passed and amended by the Congress (11, United States Code Annotated, Sections 107 and 110).

Petitioner respectfully invokes the jurisdiction of this Honorable Court as follows:

1. The Court of Appeals for the Eighth Circuit has decided an important question of Federal Law which has not been but should be settled by this Court. (Supreme Court Rule 38, Section 5, Subdivision B.)

2. The Court of Appeals for the Eighth Circuit has decided a federal question of law in a way probably in conflict with applicable principles of law as announced by the United States Supreme Court in the following cases:

Acme Harvester Co. v. *Beekman*, 222 U. S. 300, 32 S. Ct. 96, 56 L. Ed. 208.

Allen Calculators, Inc. v. *National Cash Register Co.*, 322 U. S. 137, 64 S. Ct. 905, 88 L. Ed. 1188.

Chandler & Price Co. v. *Brandtjen & Kluge, Inc.*, 296 U. S. 53, 80 L. Ed. 39.

City of Indianapolis v. *Chase National Bank*, 314 U. S. 63, 86 L. Ed. 47.

Fairbanks Steam Shovel Co. v. *Wills*, 240 U. S. 642, 36 S. Ct. 466, 60 L. Ed. 841.

Lamb v. *Kramer*, 285 U. S. 217, 76 L. Ed. 715.

Lewers and Cooke v. *Atcherly*, 222 U. S. 285, 56 L. Ed. 202.

Litchfield v. *Crane*, 123 U. S. 549, 31 L. Ed. 199.

Mackenzie v. *Engelhard & Sons Co.*, 266 U. S. 131, 69 L. Ed. 205.

Oneida Navigation Corp. v. *W. & S. Job & Co.*, 252 U. S. 520, 64 L. Ed. 697.

Smith v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 70 L. Ed. 747.

Swift & Company v. *United States*, 276 U. S. 311, 48 S. Ct. 311, 316, 72 L. Ed. 587.

Isaacs v. *Hobbs Tie & Timber Co.*, 282 U. S. 733, 51 S. Ct. 270, 75 L. Ed. 645.

3. This litigation presents a question of general importance in the construction of Sections 67 and 70 of the National Bankruptcy Act (Title 11, United States Code Anno-

tated, Sections 107 and 110) in determining title to the property belonging to a bankrupt estate and the exclusive jurisdiction of a Court of Bankruptcy to conduct the sale of assets without interference by a Court of plenary jurisdiction. (Rule 38, Section 5, Subdivision B.)

4. The Court of Appeals for the Eighth Circuit has rendered a decision in the instant case in conflict with the decisions of other Circuit Courts of Appeal on the same question as follows:

Credit Bureau of San Diego, Inc. v. *Petrasich*, (C. C. A. 9) 118 F. (2) 470.

Cresta Blanca Wine Co., Inc. v. *Eastern Wine Corp.*, (C. C. A. 2) 143 F. (2) 1012.

Deauville Associates, Inc., v. *Murrell*, (C. C. A. 5) 180 F. (2) 275.

Equitable Trust Co. v. *Connecticut Brass & Mfg. Co.*, (C. C. A. 2) 290 Fed. 715.

In Re Hoey, (C. C. A. 2) 290 Fed. 116.

Hopkins, et al. v. *Texas Company*, (C. C. A. 10) 62 F. (2) 691.

Kennedy, et al. v. *Bethlehem Steel Co.*, (C. C. A. 3) 102 F. (2) 141.

Kendrick v. *Kendrick*, (C. C. A. 5) 16 F. (2) 744.

Long Beach v. *Metcalf*, (C. C. A. 9) 103 F. (2) 483.

Ray v. *United States*, (C. C. A. 7) 121 F. (2) 416.

Selected Products Corp. v. *Humphreys*, (C. C. A. 7) 86 F. (2) 821.

U. S. v. *Columbia Gas & Electric Corp.* (C. C. A. 3) 108 F. (2) 614.

Wynne v. *Union City Brewing Co.*, (C. C. A. 3) 59 F. (2) 733.

5. The Court of Appeals for the Eighth Circuit has rendered a decision in the instant case in conflict with the decisions by that court on the same questions as follows:

Central Imp. Co. v. *Cambria Steel Co.*, (C. C. A. 8) 201 Fed. 811.

Chicago, R. I. & P. Ry. Co., v. *City of Owatonna*, (C. C. A. 8) 120 F. (2) 226.

Highway Construction Co. v. *McClelland*, (C. C. A. 8) 14 F. (2) 406.

Hoyt v. *Clancy*, (C. C. A. 8) 180 F. (2) 152.

Hunter v. *Federal Life Ins. Co.*, (C. C. A. 8) 103 F. (2) 192.

Johnson v. *Riverland Levee Dist.*, (C. C. A. 8) 117 F. (2) 711.

Montgomery Ward & Co., Inc. v. *Langer*, (C. C. A. 8) 168 F. (2) 182.

Naylor v. *Cantley*, (C. C. A. 8), 96 F. (2) 761.

In Re Shermerhorn, (C. C. A. 8) 145 Fed. 341.

Trapp v. *Metropolitan Life Ins. Co.*, (C. C. A. 8) 70 F. (2) 976.

United States v. *Nordbye, Judge*, (C. C. A. 8) 75 F. (2) 745.

Warner v. *Dworsky*, (C. C. A. 8) 193 F. (2) .....

Walling v. *Miller, et al.*, (C. C. A. 8) 138 F. (2) 629.

Woods v. *Hillcrest Terrace Corp.*, (C. C. A. 8) 170 F. (2) 980.

6. The Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. (Supreme Court Rule 38, Section 5, Subdivision B.)

7. The Court of Appeals for the Eighth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions as follows:

Abbott v. *Herron*, 90 Ark. 206, 118 S. W. 708.

Coston v. *Lee Wilson & Co.*, 109 Ark. 548, 160 S. W. 468.

Hobbs v. *Lenon*, 191 Ark. 509, 519, 87 S. W. (2) 6.

Kelly v. *Keith*, 85 Ark. 30, 106 S. W. 1173.

QUESTIONS PRESENTED

1. Did not the Court of Appeals err in holding that when the action was brought the lands in controversy were in the possession of Mosser, an adverse claimant?

2. Did not the Court of Appeals err in holding in this case, that a Court of plenary jurisdiction is to be regarded as a Court of Bankruptcy?

3. Did not the Court of Appeals err in holding the District court had jurisdiction to allow respondent's intervention?

4. Did not the Court of Appeals err in holding that because the District Court had jurisdiction to enter the consent decree of May 24, 1950, the District Court also had jurisdiction to require petitioner, a Trustee in Bankruptcy, to perform the terms of the executory contract entered into after bankruptcy between Mosser and Respondent?

5. Did not the Court of Appeals err in holding that the District Court had jurisdiction to alter and modify essential parts of a consent decree without the consent of all parties?

6. Did not the Court of Appeals err in refusing to pass upon petitioner's Motion to Dismiss?

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

1. Petitioner submits that the Court of Appeals decided an important question of law in a manner which conflicts with decisions of this Honorable Court in holding in its opinion of February 5, 1952, that when the action was brought by Petitioner the lands in controversy were in the

possession of Mosser, an adverse claimant. After the trial had commenced before the District Court, Mosser, Petitioner and Respondent entered into a consent decree. Mosser consented that title to the lands in controversy be vested in Petitioner and accepted a lien upon the property for his debt. All questions with respect to possession or an adverse claimant were thereby resolved in favor of Petitioner. The allegations contained in Petitioner's complaint become immaterial. Since the Respondent was in privy only with Mosser, Respondent was bound by the consent of Mosser to Petitioner's title. Respondent's Intervention is an admission of Petitioner's title. The transfer of the right of redemption by the bankrupts to Mosser was null and void, except as to a lien for the amounts he had advanced on behalf of the bankrupts, under the provisions of the Bankruptcy Act. The title to the lands passed to the Court of Bankruptcy as of the date of the filing of the petition.

2. Respondent raised no legal objection to the findings of fact and conclusions of law made by the District Court in the Specification of Points relied upon on appeal; in any event, the consent of Mosser waived all issues presented to the District Court and fixed the amount of his lien, and for all purposes in connection with this proceedings it must be considered Petitioner, as Trustee in Bankruptcy, was in actual or constructive possession of the lands in controversy since the date of the filing of the petition in bankruptcy. The decision of the Court of Appeals in overthrowing the decision of the District Court is predicated upon a premise not raised in the District Court, which Petitioner had no opportunity to meet, and which was concluded in Petitioner's favor by the terms of the consent order.

3. While it is true a District Court is a court of bankruptcy, it is nevertheless true a District Court in the exercise of its plenary jurisdiction is not a court of bankruptcy and cannot usurp the functions of that court. A sale of assets belonging to the bankrupt estate can be conducted only as directed by the provisions of the Bankruptcy Act and the General Orders pertaining thereto as promulgated by the United States Supreme Court. Respondent's intervention was for the sole purpose of requiring Petitioner to carry out the terms of the executory contract. This con-

tract was entered into between Mosser and Respondent after bankruptcy, with actual knowledge of the bankruptcy proceedings, and after this suit and *lis pendens* had been filed. The intervention does not in any respect comply with the provisions of Rule 24 of the Rules of Civil Procedure. Respondent did not allege facts sufficient to show that, as a matter of equitable right, he was entitled to intervene. The record shows the defendant sued was the real party in interest and that the Respondent was not. There is no suggestion that the issues raised by the intervention, if any, may not be adjudged in a separate suit. Respondent was not entitled to come into the suit for the purpose of having adjudicated a controversy between himself and the Petitioner, or a controversy between himself and the defendant. The issues are limited to the field of litigation opened to the parties by Petitioner's original bill. When the matter was again presented to the District Court, that court recognized it was without jurisdiction to allow Respondent's intervention. The effect of the decision of the Court of Appeals is to permit the Respondent to encumber the main action with extraneous issues of a private nature in such manner as to complicate, delay and prejudice the rights of the original parties, particularly the Petitioner, as a representative of the creditors of the bankrupt estate, and to unduly delay the administration of the estate of the bankrupts.

4. The notice of *lis pendens* charged Mosser and Respondent that the Court of Bankruptcy had reached out to embrace the lands in controversy under the provisions of the Bankruptcy Act. There has never been any question but what the District Court had jurisdiction to entertain the Petitioner's original plenary proceedings. It did not have jurisdiction to require Petitioner to perform the terms of the contract entered into after bankruptcy between Mosser and Respondent, nor did the Petitioner have authority by entering into that portion of the consent decree, to waive the exclusive jurisdiction of the Court of Bankruptcy. Under the terms of the order appealed from Petitioner and Respondent were placed in their proper legal positions as of May 24, 1950, the date of the original order, leaving the Respondent to pursue whatever remedies might be available to him in other courts. The decision of the Court of

Appeals deprives the Court of Bankruptcy of the possession vested in it by the express terms of the Bankruptcy Act, acquiesced in by Mosser, and the duty of selling the assets as provided by law. The decision of the Court of Appeals is further erroneous in holding that a Trustee in Bankruptcy may waive the jurisdiction of a Court of Bankruptcy without that court's permission.

5. The record shows neither the defendant, Mosser, nor the Petitioner, consented to any alteration or modification of the consent decree. On the contrary, consent was expressly withheld. The District Court set aside all orders granting Respondent successive extensions of time. A consent decree may be entered into only by parties having full authority to act, and the court must have complete jurisdiction over the parties and the subject-matter. If it be conceded the decree of May 24, 1950, is a consent decree based upon all requirements which the Petitioner was authorized to enter into, the decree could not be altered or modified without the consent of all the parties. The Court of Appeals re-stated the law to be a consent decree, until reversed or vacated in the manner provided by law, is conclusive upon the parties and cannot be modified in any essential part without the consent of the parties, while at the same time holding that it is within the discretion of the District Court to extend the time-limit allowed under the provisions of the consent decree in which to complete the purchase of the lands involved. The Court of Appeals has thus erroneously sanctioned a material alteration and modification of the consent decree and has, in effect, sanctioned a new contract without the consent of the Petitioner or Mosser, and to which Petitioner has always objected.

6. The record shows the appeal prosecuted is not from the final order in the case. After filing Notice of Appeal the Respondent petitioned the District Court for an order permitting him to take down the voluntary tender he had made to the Clerk of the District Court, and also the tender made by Petitioner. The order was entered without prejudice to Respondent's right of appeal. The Respondent's appeal was perfected by the act of filing his Notice of Appeal. The final order in the case altered and modified the order appealed from. Respondent's right, if any, de-

pended upon his tender. Respondent has accepted all of the benefits of the order appealed from, while attempting to appeal from that portion of the order unfavorable to him. The general rule is that appellate courts have jurisdiction only from judgments which are both final and complete. The rule in the State of Arkansas is that after a tender is made it must, to preserve its legal effect, be kept good. Proper procedure demanded that Respondent leave his voluntary tender undisturbed; withdrawal was not necessary to any issue involved. The withdrawal of both tenders by Respondent bars his appeal.

7. The record further shows Respondent borrowed the money used in making his tender by executing a mortgage upon the lands to which he had no title. The execution of such a mortgage was not authorized by the District Court nor the Court of Bankruptcy. The rule is that when money is borrowed for the express purpose of making a tender, and the tender is refused, the money paid back to the lender, the tender is not good. The questions presented by Respondent on appeal to the Court of Appeals are, therefore, moot.

8. Petitioner contends jurisdiction is prescribed by law and can neither be increased nor diminished by consent of the parties. A Trustee in Bankruptcy may not barter away his rights. He is an arm of the Court of Bankruptcy and can act only upon the orders of that court. He is not authorized to waive the jurisdiction of the Court of Bankruptcy without express permission. It is apparent from the record the District Court acquired no jurisdiction over the subject-matter of the appeal, and therefore the Court of Appeals could acquire no jurisdiction. Where judicial tribunals have no jurisdiction of the subject-matter over which they assume to act, their proceedings are absolutely void in the strictest sense of the term. The Court of Appeals relied upon decisions interpreting Section 23(b) of the Bankruptcy Act (11 U. S. C. A., Sec. 5) as a grant of jurisdiction to the District Court in suits brought by Trustees in Bankruptcy against adverse claimants. There is no such question here. If there had been such a question, it was eliminated by the consent decree entered into by Petitioner and Mosser. The equity jurisdiction of a District Court is entirely separate

and apart from its jurisdiction in bankruptcy. The attempts of other courts to interfere with this exclusive jurisdiction have been consistently resisted. The fact that the judge of a District Court, sitting in equity, can protect the rights of all parties as well as if he were sitting in bankruptcy is entirely beside the question.

WHEREFORE, Petitioner prays that a Writ of Certiorari be issued by this Honorable Court directed to the United States Court of Appeals for the Eighth Circuit, sitting in St. Louis, Missouri, commanding that Court to certify and send to this Court for its review and determination, on a date to be designated, the record and cause on the docket of said Court of Appeals numbered 14,369 and there styled, "W. D. May, Appellant, versus W. E. Moss, Trustee in Bankruptcy of the Estate of Leon S. Horne and Nell Horne, doing business as Star City Lumber Company, Appellee," and that any judgment which may be based thereon by the United States Court of Appeals for the Eighth Circuit be reviewed and determined by this Honorable Court, and that Petitioner have such other and further relief as to this Honorable Court appears just.

D. D. PANICH,

For Petitioner,

Little Rock, Arkansas.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINIONS OF COURTS BELOW

The original order of the District Court, dated May 23, 1950, appears in the record at pages 16-18 inclusive. The Memorandum Opinion appears in the record at pages 60-63 inclusive. The decree from which Respondent appealed, dated March 7, 1951, appears in the record at pages 70-73 inclusive.

The Opinion of the Court of Appeals, rendered February 5, 1952, is reported in 194 Fed. (2) ....., and appears in the record at pages 115-122 inclusive.

II. JURISDICTION INVOKED

Statement of the jurisdiction invoked appears in the petition of certiorari. Reliance is had upon the revised rules of this Court, Rule 38, Section 5, Subsection b.

III. STATEMENT OF THE CASE

Leon S. Horne and Nell Horne were engaged in the lumber business at Star City. They owned large tracts of timberlands and were heavily indebted to A. B. Banks & Company. In October 1948 they conveyed certain of these lands situated in Lincoln County, Arkansas, to A. B. Banks & Company and at the same time entered into a written agreement under the terms of which they were given the right and option to redeem the lands within a prescribed period of time. Prior to the expiration of the redemption period, the bankrupts, without fair consideration, assigned this right to H. J. Mosser of Fort Worth, Texas. Mosser exercised the right of redemption on behalf of the bankrupts on June 13, 1949. The lands in controversy were conveyed to him by A. B. Banks & Company by special warranty deed.

Involuntary bankruptcy proceedings were instituted against the Hornes on December 22, 1949. An order of adjudication was made on January 9, 1950, and in the same order reference of the proceedings was made to the Referee in Bankruptcy. On January 23, 1950, Petitioner instituted

a plenary action against Mosser in the United States District Court for the Eastern District of Arkansas, Western Division, for the purpose of construing the special warranty deed to be a mortgage upon the lands in controversy. On the same date, Petitioner filed notice of *lis pendens* in which he stated specifically suit had been instituted against Mosser to cancel the special warranty deed and to construe same to be a trust for the benefit of the creditors of the bankrupt estate. Attached to the notice of *lis pendens* was a detailed description of the lands in controversy (R. 3, 6, 7).

On February 16, 1950, Petitioner filed his amended and substituted complaint (R. 8, 9). The amended and substituted complaint set out all of the matters in controversy and particularly alleged the transaction to be null and void under Sections 67 and 70 of the Bankruptcy Act (11 U. S. C. A., Sec. 107, 110). Mosser filed his answer and the case proceeded to trial. By reason of the consent decree entered into between Petitioner and Mosser on May 23, 1950, the date of the trial, it is not necessary to detail the allegations of the complaint, since all of the allegations were resolved in favor of Petitioner and must be accepted as true for all purposes in connection with this petition. Respondent made no effort to intervene in the case until after the noon recess. Petitioner objected to the intervention at that time (R. 22, 23). An agreement was reached between the parties and a consent decree was entered which vested title to the lands in controversy in Petitioner, fixed the amount of Mosser's lien and the Petitioner was directed to perform the executory contract in the place and stead of Mosser (R. 16-18). Over Petitioner's objection, Respondent was granted thirty days in which to meet title requirements and to secure the money necessary to pay Petitioner. The District Court directed the terms under which Respondent could purchase the lands (R. 30). The written motion of Respondent, intervening as a defendant, and his intervention were not filed until May 31, 1950. The Respondent alleged he had defenses to Petitioner's claim presenting both questions of law and fact common to the main action (R. 31). The intervention admits the contract between Mosser and Intervenor was entered into after bankruptcy. The intervention states only that Petitioner

should be directed to perform as the vendor in the place of Mosser in accordance with the terms of the contract dated February 7, 1950, and that Intervenor be allowed thirty days to pay the balance of the consideration (R. 31, 32). The formal consent order entered into on May 23, 1950, was filed on May 24, 1950 (R. 16). The Respondent was required to furnish Petitioner's attorney all the title requirements within a definite time-limit, and was granted thirty days from the date of the order to conclude the purchase of the lands, provided the title requirements be met. It was provided in the original consent decree that if Respondent should not purchase the lands in accordance with the terms of that decree, all rights accruing to the Respondent under the terms of the contract dated February 7, 1950, were forfeited, the contract be held null and void, and Petitioner was authorized to sell the land upon notice to creditors of the bankrupt estate as is by law provided (R. 16, 18).

The executory contract entered into on February 7, 1950, between Mosser and Respondent specifically provided it was to be consummated within sixty days from its date unless merchantable title could not be delivered within that time due to an action in bankruptcy pending in the United States District Court for the Eastern District of Arkansas, Western Division, cause number 5005, or other legal proceedings growing out of said bankruptcy proceeding (R. 20). Respondent defaulted under the terms of the consent decree. Upon oral motion, and over Petitioner's objections, Respondent was granted an additional ten days in which to comply with the terms of the decree (R. 32). Neither Petitioner nor Mosser consented to the extension of time. The District Court provided in that order no further extensions of time would be granted to the Respondent. The Respondent again defaulted (R. 33).

On July 3, 1950, Petitioner and Respondent entered into a new consent decree to which Mosser was not a party. The decree recited Respondent had wholly failed to comply with the terms of the previous decrees of the court and was on that date unable to comply with the terms of said decrees, and in order to secure additional time, Respondent consented and agreed to make certain payments

upon dates as stipulated in the decree, agreed to borrow the sum of $71,250 necessary to pay off the lien of Mosser, and was granted authority to have the lien of Mosser transferred to any person making the loan. It was again specifically provided that Respondent would ask for no further extension of time for any payment due under the terms of the decree in the event of further default (R. 33, 37). Respondent negotiated a loan from W. R. Alsobrook to pay off Mosser's lien. The money was paid over to Petitioner by Alsobrook and, by Petitioner, under a proper order of the Court of Bankruptcy, paid to Mosser (R. 69, 70). The lien owned by Mosser was transferred to Alsobrook. Under the terms of the last consent decree, Respondent was required to pay Alsobrook in three equal monthly installments, commencing on August 23, 1950. Respondent defaulted on the installment due October 23, 1950. He defaulted in the first payment due to Petitioner in November, 1950. Respondent remained in default to both Alsobrook and Petitioner until December 21, 1950, when Petitioner filed a motion setting out the various defaults of Respondent; that the lienholder, Alsobrook, had demanded payment of his lien and asked authority to petition the Referee in Bankruptcy for proper orders concerning a sale of the lands (R. 43). Various other petitions not pertinent to the writ of certiorari were filed. On December 28, 1950, a hearing was held before the District Court, as a result of which on December 30, 1950, an order was entered upon Petitioner's motion in which the various defaults by the Respondent were set out in detail. At this hearing Petitioner, in open court, offered to refund to Respondent the amount of money Respondent had paid to Alsobrook and to Petitioner. The amount of these payments was later determined and tendered into the registry of the District Court (R. 63). Over the vigorous objections of Petitioner, Respondent was granted additional time in which to secure the entire balance of the money in default and to comply with the terms of the consent decree (R. 45-48). Within the additional time allowed, Respondent, without authority, executed a mortgage upon the lands in controversy and secured the money. He made a tender to the clerk of the District Court in the form of a cashier's check. This check was accepted by the district clerk upon

instructions received from the District Judge. Petitioner refused to accept the tender. Petitioner had prior thereto tendered to the district clerk the amount of money Respondent had paid to Alsobrook and Petitioner. Respondent petitioned the District Court for an order directing Petitioner to execute a "commissioner's deed" conveying the lands to Respondent (R. 49, 50). Petitioner filed a response under the provisions of Rule 62(a) of the Rules of Civil Procedure and asked that the petition be dismissed; and on January 5, 1951, Petitioner filed a motion praying that the order of December 28, 1950, be modified so as to eliminate the extension of time granted Respondent and that Petitioner be authorized to sell the lands in controversy as is provided by law (R. 51-54). Respondent filed a response to this motion admitting he had mortgaged the lands in controversy for the purpose of borrowing the money necessary to make the tender (R. 55-58). After several hearings, the District Court filed its memorandum opinion in which it stated the pertinent inquiry before the court to be (R. 61):

> "In a plenary action in equity brought by the Trustee in Bankruptcy to have this transfer and assignment held to be a trust for the benefit of all creditors, did this court have jurisdiction to enter an order as that of May 24, 1950, directing the Trustee in Bankruptcy to perform as vendor, etc?"

In its findings the District Court held that Courts of Bankruptcy are separate and distinct from all other Federal Courts; that their jurisdiction is exclusive; that the property of the bankrupt is *in custodia legis* from the filing of the petition, and that the lands in controversy passed to the custody of the Bankruptcy Court upon the filing of the petition in bankruptcy, subject only to the lien of Mosser. That after the filing of the petition, no other court can have or assume jurisdiction over any of the assets of the bankrupt estate; that the present action was a plenary action in equity to reduce the assets to actual possession of the Trustee in Bankruptcy and the court was without jurisdiction to direct the Trustee to perform the terms of the executory contract; that the Court of Bankruptcy had not surrendered and could not surrender its exclusive jurisdic-

tion, nor be deprived of that jurisdiction, by consent of the parties to any orders or proceedings since the filing of the petition in bankruptcy (R. 60-63). There were no objections filed to the findings of fact or conclusions of law as set out in the memorandum opinion. The Specification of Points relied upon by Respondent in his appeal to the Court of Appeals raised only the question of jurisdiction (R. 107, 108).

Pursuant to the memorandum opinion of the District Court, on March 7, 1951, a decree was entered which *amended* the original decree of March 24, 1950, by dismissing Respondent's intervention for want of jurisdiction, and which permitted Respondent to withdraw his tender and also the tender made by Petitioner. The amended decree further provided that all previous decrees of the court were set aside (R. 70-73). On April 3, 1951, Respondent filed Notice of Appeal (R. 73). On April 26, 1951, Respondent filed a petition for authority to withdraw both tenders "without prejudice to his right to prosecute his appeal." On the same date the District Court entered an order granting the prayer of the petition (R. 74, 75). Respondent admits the urgency in securing the refund of both tenders on that date was by reason of a demand made upon him by A. B. Banks & Company, who had loaned Respondent the money to make his tender, and that the money had to be repaid on that date (R. 92). On June 25, 1951, Petitioner filed a motion in the Court of Appeals to dismiss the appeal (R. 111). Response was duly filed by the Respondent (R. 113). On July 17, 1951, the motion was denied without prejudice to the right of Petitioner to renew the motion in connection with the consideration of the issues presented on appeal. When the case was reached on call, the motion to dismiss was renewed. Judgment of the Court of Appeals was entered on February 5, 1952 (R. 123). Petition for Rehearing was filed on February 27, 1952. Formal Order denying the Petition was entered on March 1, 1952 (R. 163).

IV. ARGUMENT

The basic error underlying the decision of the Court of Appeals is the refusal of that court to accept the findings of the District Court that the lands in controversy

passed into the custody of the Court of Bankruptcy upon the filing of the petition subject only to the lien of Mosser, and that such custody is exclusive. There was no challenge to the jurisdiction of the District Court to try the issues originally presented in the pleadings as between Mosser, defendant, and Petitioner, plaintiff, below. Since Mosser consented title to the lands in controversy belonged in Petitioner, the District Court was not called upon to pass upon any question pertaining to possession or adverse claim. Under the provisions of Section 70(a) of the Bankruptcy Act (11 U. S. C. A., Sec. 110) the Trustee in Bankruptcy was vested by operation of law with the title of the bankrupts, as of the date of the filing of the petition in bankruptcy, to all property held by or for the bankrupts, except such as might be exempt by law. Under the provisions of Section 67(d)(4) of the Act (11 U. S. C. A., Sec. 107), every transfer of partnership property which occurred within one year prior to the filing of the petition in bankruptcy is fraudulent as to partnership creditors, without regard to actual intent, if the transfer be made without fair consideration. Section 67(d)(6) of the Act (11 U. S. C. A., Sec. 107) provides that such transfers shall be null and void against a trustee, except as to a *bona fide* purchaser, lienor or obligee for a present, fair, equivalent value. By the terms of the consent decree, Mosser secured everything he was entitled to receive under the provisions of the Bankruptcy Act, or that he would have been entitled to at the conclusion of the lawsuit. The deed by which the property was conveyed to Mosser was simply a mortgage and he was holding the lands as security for the debt which the bankrupts owed. The transaction was void under the above cited Sections of the Bankruptcy Act.

The lands in controversy, without dispute, are wild timber lands. In the case of *St. Louis Refrigerator & Wooden Gutter Company* v. *Thornton*, 74 Ark. 383, 86 S. W. 852, the Supreme Court of Arkansas stated the rule to be, if the lands be wild and unoccupied it is in the constructive possession of the true owner. The lands in controversy were originally conveyed by the bankrupts to A. B. Banks & Company as security for their debt to that company. At the time of conveyance, the right of redemption was reserved. Within the time for redemption, the

bankrupts transferred their right to Mosser without fair consideration. Mosser took title to the lands for the bankrupts. The true owners have, therefore, at all times been the bankrupts. Mosser, the only person who could have raised any question concerning possession, concluded all of his rights with Petitioner and entered into the consent decree. Jurisdiction over the lands must be determined by the provisions of the Bankruptcy Act and the consent of Mosser that the title and possession was in the petitioner. Mosser's consent concluded his rights and those with whom he was in privy.

In the case of *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 733, 51 S. Ct. 270, 75 L. Ed. 645, this court found it necessary, in the ends of justice, to reverse a decision of the United States District Court for the Western District of Arkansas concerning possession and jurisdiction over property of a bankrupt estate. In its opinion, this Court stated:

> "Upon adjudication, title to the bankrupt's property vests in the Trustee with actual or constructive possession, and is placed in the custody of the Bankruptcy Court (*Mueller* v. *Nugent*, 184 U. S. 1, 46 L. Ed. 465, 22 S. Ct. 269). The title and right to possession of all property owned and possessed by the bankrupt vests in the Trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits (*Robertson* v. *Howard*, 229 U. S. 254-259, 57 L. Ed. 1174, 33 S. Ct. 854; *T. E. Wells* v. *Sharp*, 125 C. C. A. 609, 208 Fed. 393; *Galbreath* v. *Robinson-Hilliard Grocery Co.*, 133 C. C. A. 46, 216 Fed. 842, 32 A. B. R. 752). It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. It may order a sale of real estate lying outside the district (citing cases). When this jurisdiction has attached, the court's possession cannot be affected by actions brought in other courts (*White* v. *Schloerb*, 178 U. S. 542, 44 L. Ed. 1183, 20 S. Ct. 107; *Murphy* v. *John Hoffman Co.*, 211 U. S. 562, 53 L. Ed. 307, 29 S. Ct. 154; *Dayton* v. *Stannard*, 241 U. S. 588, 60 L. Ed. 1190, 36 S. Ct. 695). This is but an

application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession, and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property" (citing cases).

* * * *

"Jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate, and preserves all the rights of secured and unsecured creditors. This fact places it beyond the power of the court's officers to oust it by surrender of property which has come into its possession (*Whitney* v. *Brennan*, 198 U. S. 539, 49 L. Ed. 1157, 25 S. Ct. 778; *Re: Shermerhorn*, 145 Fed. 341.) Indeed, the court of bankruptcy itself is powerless to surrender its control of the administration of the estate (*United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S. 205, 56 L. Ed. 1055, 32 S. Ct. 620).* * *"

The Court of Appeals held jurisdiction of the original action is expressly conferred on the District Court by Section 23 of the Bankruptcy Act (11 U. S. C. A., Sec. 46). In the case of *Long Beach* v. *Metcalf*, 103 F. (2) 483, the Court of Appeals for the Ninth Circuit said:

"Thereafter, notwithstanding Section 23, *supra*, the Bankruptcy Court, having possession of the property, had jurisdiction to hear and determine all questions respecting title thereto (citing cases). Whether such possession was actual or constructive is immaterial. Constructive possession was sufficient. *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 44 S. Ct. 396, 67 L. E. 770. We hold, therefore, that the bankruptcy court had jurisdiction of this proceeding."

There has never been any question but what the District Court had jurisdiction to try the issues between Petitioner and Mosser. The challenge to the jurisdiction of the District Court comes about by reason of the intervention filed

by Respondent, which completely changed the field of litigation opened by the original pleadings. The Court of Appeals relied upon the decision of this Court in *Schumacher* v. *Beeler*, 293 U. S. 367, 79 L. Ed. 433, interpreting Section 23(b) of the Bankruptcy Act as a grant of jurisdiction to the District Courts in suits brought by Trustees in Bankruptcy against adverse claimants; also as a grant of jurisdiction to the District Courts of suits brought for the recovery of property under Sections 60, 67 and 70 of the Bankruptcy Act without the consent of the defendants (R. 120). The error of the Court of Appeals in applying the Schumacher case, *supra*, to the case at bar, is that here there is no question as to an adverse claimant, and no question as to suing a defendant without his consent. However adverse may have been the claim of possession of Mosser up to the time of the filing of the petition in bankruptcy, December 22, 1949, the possession was interrupted at that time and the lands passed into the custody of the Court of Bankruptcy by operation of law. Under the provisions of Sections 67 and 70 of the Bankruptcy Act (11 U. S. C. A., Secs. 107, 110) Mosser could not have claimed the lands as his because they were held by the court from the time of the filing of the petition. Apparently Mosser recognized and respected the law, and entered into the consent decree. The lien which he held existed at the time of the commencement of the bankruptcy proceedings. It was good as against the Trustee. The Bankruptcy Court being in possession of the lands, either actually or constructively, the Trustee was authorized to enter into a court of plenary jurisdiction for the purpose of reforming Mosser's deed and to fix the amount of his lien. It has been generally recognized that when a petition in bankruptcy is filed, all property of the bankrupts, wherever situated, is then and there brought into *custodia legis*. *Fairbanks Steam Shovel Co.* v. *Wills*, 240 U. S. 642, 36 S. Ct. 466, 60 L. Ed. 841; *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 32 S. Ct. 96, 56 L. Ed. 208.

The Court of Appeals in its opinion held, if the complaint stated an action under either Section 67 or 70 of the Bankruptcy Act, the District Court is to be regarded as a court of bankruptcy. *Lowenstein* v. *Reikes*, 54 F. (2) 481, and other cases of similar import, are cited as authority

for this proposition of law (R. 121). There can be no denial but that the District Court had jurisdiction over the original proceedings between Petitioner and Mosser as the issues were joined by the pleadings. But those issues were settled by consent. In the Lowenstein case, *supra,* there were four causes of action. The case was tried to a jury. The question presented there was whether an independent plenary suit brought on the Equity side of the court is a controversy arising in bankruptcy proceedings from the court of bankruptcy, within the meaning of Section 24(a), (11 U. S. C. A., Sec. 47(a)) and therefore whether Section 24(c) limiting the time of appeal was applicable. The court there said that such suits may be regarded as being in a court of bankruptcy; but they are not, however, controversies arising in bankruptcy proceedings. There is no such question here. Neither the time nor manner of appeal is in question. The question here is whether or not the District Court had jurisdiction to do what it directed be done by the terms of the decree from which Respondent appealed.

In the case of *Naylor* v. *Cantley,* 96 Fed. (2) 761, the Court of Appeals for the Eighth Circuit settled the question as follows:

> "In *Hanna* v. *Brockton Mfg. Co.,* 62 Fed. (2) 139, at page 145, this Court pointed out that the equity jurisdiction of a Federal Court is something entirely separate and apart from its jurisdiction in bankruptcy; that the jurisdiction of a Court of Bankruptcy is exclusive with respect to all questions pertaining to bankruptcy and to the administration of insolvent estates in bankruptcy; that Courts of Bankruptcy are separate and distinct courts; that the exclusive jurisdiction of a court of Bankruptcy cannot be surrendered; that attempts of other courts to interfere with the jurisdiction of Courts of Bankruptcy have been consistently resisted; that an adjudication of bankruptcy made by the court having jurisdiction of the bankrupt cannot be impeached collaterally, and that an adjudication until vacated is binding upon all parties to it. See also *Cornwell Press, Inc.* v. *Ray Long and Richard R. Smith, Inc.,* 2 Cir. 75 Fed. (2) 276. That the Judge of

a Federal Court, sitting in equity, can protect the rights of all parties as well as if he were sitting in bankruptcy is entirely beside the question" (citing cases).

The deed conveying the property to Mosser was no more than a mortgage. Under any construction of the facts and law, title of Mosser was the title of the bankrupts. The title was simply held by Mosser for the bankrupts. It follows that the true legal status of the lands in controversy, at all times necessary for consideration here, was that the title was in the bankrupts, subject to payment to Mosser of his debt. In the case of *In Re Hocy,* (C. C. A. 2) 290 Fed. 116, the court stated:

> "It is well established that the Federal Court of Bankruptcy has exclusive jurisdiction over all property held by or for the bankrupt and not in possession of an adverse claimant, *Lazarus* v. *Prentice,* 234 U. S. 263, 58 L. Ed. 1305, 34 S. Ct. 851. When that court once has jurisdiction over a *res,* no subsequent action of any other court can divest it thereof. The filing of a petition in bankruptcy fixed the date from which the jurisdiction attached, *Mueller* v. *Nugent,* 184 U. S. 1, 46 L. Ed. 405. What then passed to its jurisdiction is property actually or constructively in the possession of the bankrupt, if the legal title thereto is not in a third party. It would also obtain jurisdiction over property in adverse possession of a third party if the true legal status were that the title was in the bankrupt, *Thomas* v. *Woods,* 173 Fed. 585, 97 C. C. A. 535, 26 L. R. A., N. S. 1180; *Clay* v. *Waters,* 178 Fed. 385, 101 C. C. A. 645; *Orinoco Iron Co.* v. *Metzel,* 230 Fed. 40, 144 C. C. A. 338."

Since there is no suggestion in the record Mosser contended he was an adverse claimant, and the question was

not ruled upon below, the Court of Appeals was not required to concern itself with the question. *Trapp* v. *Metropolitan Life Ins. Co.*, (C. C. A. 8) 70 F. (2) 976; *Montgomery-Ward & Co. Inc.* v. *Langer*, (C. C. A. 8), 168 F. (2) 182, 185; *Woods* v. *Hillcrest Terrace Corp.*, (C. C. A. 8) 170 F. (2) 980; *Hoyt* v. *Clancy*, (C. C. A. 8) 180 F. (2) 152; *Warner* v. *Dworsky*, (C. C. A. 8) 193 F. (2) .....

The Court of Appeals held that the District Court had jurisdiction to allow Respondent's intervention (R. 122). Rule 24 of the Rules of Civil Procedure (28 U. S. C. A., following Section 723) is the authority for allowance or disallowance of interventions. Interventions may be allowed as a matter of right or by permission. If permissive intervention is sought, then the trial court has wide discretion. (4 *Moore's Federal Practice*, 24.10 (2) (4), pp. 59, 62). The Rule provides, in the exercise of its discretion, the court shall consider whether the intervention will unduly delay or prejudice the rights of the original parties. There are no contractual rights between Respondent and the petitioner. Respondent did not intervene until after the trial had been in progress for a half of a day (R. 22). Respondent intervened for one purpose—to require petitioner to convey the lands in controversy to him under the terms of the contract entered into with Mosser (R. 31, 32). Respondent thereby expressly admitted the title and possession of the lands to be in petitioner. The District Court had no jurisdiction to grant the relief prayed in the intervention. There is nothing contained in Respondent's intervention which raises a question of law or fact in common with the main action as required by Rule 24. Nor were the lands involved in the custody or subject to disposition by the District Court. There must be some legal or equitable interest in the property before an intervention can be rightfully claimed. *U. S.* v. *Columbia Gas & Electric Corp.*, 27 Fed. Suppl. 116; appeal dismissed, 108 Fed. (2) 614; *certiorari*

denied, 399 U. S. 687, 60 S. Ct. 887; 84 L. Ed. 1030. In some cases, intervention is an absolute right; in others, the granting of leave to intervene rests in the discretion of the trial court. *Equitable Trust Co.* v. *Connecticut Brass & Mfg. Co.*, (C. C. A. 2) 290 Fed. 715.

An order denying intervention is appealable if the intervention was a matter of right. If the intervention is permissive only, denial thereof is not appealable unless the court abused its discretion. *Cresta Blanca Wine Co., Inc.*, v. *Eastern Wine Corp.*, (C. C. A. 2) 143 F. (2) 1012, 8 F. R. Serv. 24 c. 41, case 1; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 64 S. Ct. 905, 88 L. Ed. 1188. The order of the District Court dismissing respondent's intervention amounted to nothing more nor less than an order refusing leave to intervene. It was a discretionary order which leaves respondent at full liberty to assert any right he may have in any other appropriate form of proceeding.

In the case of *Kennedy, et al.*, v. *Bethlehem Steel Co.*, (C. C. A. 3) 102 F. (2) 141, a similar situation was construed. The appellants there appealed from an order of the District Court dismissing their petition for leave to intervene. The appellee was the purchaser at a foreclosure sale and filed a Motion to Dismiss the appeal. The Court said:

> "The motion must be granted. It is settled that an order refusing leave to intervene in a civil action is interlocutory. Not only is it a discretionary order but it leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. It consequently lacks the finality which is necessary to support an appeal. *Credits Commutation Co.* v. *United States*, 177 U. S. 311, 20 S. Ct. 636, 44 L. Ed. 782."

In the case of *In Re Willacy County Water Control & Improvement District No. 1*, 36 F. Suppl. 36, the Court there made a very comprehensive construction of Rule 24 of the Rules of Civil Procedure. The Court said:

> "Rule 24 treats of two sorts of interventions. One is a matter of right, and the other is permissive. The

> matter of right intervention grows out of the principle that the party may be bound by a judgment in the action and that the representation of his interest by existing parties may be inadequate; and of course, in any case in which he is likely to be adversely affected by a disposition of property in the custody of the court. A permissive intervention comes out of judicial discretion whenever a Federal Statute gives a conditional right, or when an applicant's claim or defense and the main action have a question of law or fact in common. This rule cautions the court to consider whether the proposed intervention will unduly delay or prejudice the adjudication of the rights of the original parties. When the claim or defense of the applicant departs from the field of litigation or the original parties in such manner as to complicate and delay its determination, leave should be denied" (citing cases).

Under the provisions of Rule 24 there must be some connection between Respondent's claim and the main action. Respondent's rights could rise no higher than the rights of Mosser. Mosser's rights went out of the lawsuit upon consent with Petitioner. Respondent could not inject any new issues into the case or enlarge upon the issue presented by the original pleadings, nor could he resolve the case into a suit between himself and the appellee.

In the case of *Chandler & Price Co.* v. *Brandtjen & Kluge, Inc.*, 296 U. S. 53, 80 L. Ed. 39, this Court carefully considered the rules applicable to the allowance of an intervention. In construing the Rule, this Court said:

> "* * * The Bill neither alleges any cause of action nor prays judgment against the intervenor. Petitioner was not sued and, until granted leave to intervene, it was a stranger to the suit. The facts alleged in its application were not sufficient to show that as a matter of equitable right petitioner is entitled to intervene. *Western Union Telegraph Co.* v. *United States & M. Trust Co.*, (C. C. A. 8) 221 Fed. 545; *United States Trust Co.* v. *Chicago Terminal Transfer R. Co.*, 188 Fed. 292; *Toler* v. *East Tennessee V. & G. R. Co., supra*, (67 Fed. 171); *Chester* v. *Life Asso.*, C. C., 4 Fed. 487. * * *

The record discloses no foundation for the claim that the defendant sued is not, or that the intervenor is, the real defendant in interest. There is no suggestion that defendant has any interest in the counter-claim, or that the issues between intervener and the plaintiff that are tendered by, or that might possibly arise out of, the counterclaim could not be adjudged in a separate suit. The intervener was not entitled to come into the suit for the purpose of having adjudicated a controversy solely between it and plaintiff. Issues tendered by or arising out of plaintiff's bill may not, by the intervener, be so enlarged. It is limited to the field of litigation opened to the original parties. *Curran* v. *St. Charles Car Co.*, 32 Fed. 837; *Powell* v. *Leicester Mills*, 92 Fed. 115; *Atlas Underwear Co.* v. *Cooper Underwear Co.*, 210 Fed. 347; *Leaver* v. *K. & L. Box & Lumber Co.*, 6 F. (2) 666; *De Sousa* v. *Crocker First National Bank*, 23 F. (2) 118; *Drainage Comrs.* v. *Lafayette Southside Bank*, 27 F. (2) 286; *Tretolite Co.* v. *Darby Petroleum Corp.*, 5 F. Suppl. 445. * * *

"Exclusion from the litigation of that demand is consonant with reason and in the interest of justice. Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill. *Lever* v. *K. & L. Box & Lumber Co.*, 6 F. (2) 666, *supra*; *Gregory* v. *Pike*, 67 Fed. 837. * * *"

Even though an intervention be unopposed, the Court may consider on its own motion whether there is a right to intervene and deny the intervention. *Tolliver* v. *Cudahy Packing Co.*, 39 F. Suppl. 337. In the case at bar, the District Court originally allowed respondent's intervention. Since Respondent could not inject new issues into the case; enlarge upon the issues presented by the original pleadings or resolve the case into a suit between himself and Petitioner, the District Court was correct in later holding it had no jurisdiction to allow the intervention.

Mosser's defense to the original suit was adequate. Respondent could not attack petitioner's title, in fact, he

admitted that title by intervening and asking the District Court to require Petitioner to carry out the terms of the contract he entered into with Mosser. Mosser could not perform the contract because he had no title. Petitioner was not required to furnish Mosser title or perform what Mosser was never legally in position to do. In the case of *Deauville Associates, Inc.* v. *Murrell, et al.*, 180 F. (2) 275, various parties sued Laser and others to rescind transactions between parties respecting sales of property of the Deauville Corporation to Laser and another. Appellant, under Rule 24, claimed the right to intervene generally from the date of his petition for the purpose of attacking numerous decrees theretofore entered affecting the property. The Court said:

> "This contention is without merit, for it ignores the undisputed fact of record that appellant was not a party to the original suit, but acquired whatever rights it may have in the property, if any, only by virtue of the assignment from Laser and Winkle, and must therefore stand in their shoes with respect to all phases of the litigation. * * * As stated in our prior decision, appellant has no absolute right of intervention under the assignment and Rule 24(a), but 'only the right to have such fruits of the suit awarded it under the contract as might otherwise have been awarded to Laser and Winkle' * * *."

The Court of Appeals in reversing the District Court held the various orders of the court extending Respondent's time to complete the purchase from petitioner were within the District Court's discretion (R. 122). There is no contention the District Court abused its discretion by entering the order from which respondent appealed. If so, the District Court had the right to revoke that discretion upon a re-examination of the facts and the law. After further hearings, the District Court held it did not have jurisdiction in the beginning to allow the intervention nor the discretion which it subsequently exercised by granting successive extensions of time in which to perform. The effect of the findings of the Court of Appeals is to substitute its discretion for that of the District Court and, this it may not do in the absence of clear abuse.

The Court of Appeals held that since the District Court had power to enter the original consent decree of May 24, 1950, vesting title to the lands in Petitioner subject to Mosser's lien, it also had jurisdiction to require Petitioner to carry out Mosser's obligation to sell the lands to Respondent (R. 122). Mosser and Respondent entered into their oral agreement after the order of adjudication and reference of the proceedings to the Referee. The written contract was entered into after the original suit had been filed and after Notice of *Lis Pendens* had been filed. These facts are admitted in Respondent's intervention (R. 31). The written contract shows conclusively these parties had actual knowledge of the bankruptcy proceedings and provided that Mosser's title depended upon the outcome of the bankruptcy proceedings or other legal proceedings growing out of the bankruptcy proceedings (R. 20). The rule is well settled that whoever acquires an interest in property involved in litigation stands in the same position as his vendor, whether he purchased for a valuable consideration or not. He takes the property subject to any judgment or decree that may be rendered. A purchaser *pendente lite* gets nothing in the event his vendor's opponent prevails. *Mackenzie* v. *Engelhard & Sons Co.*, 266 U. S. 131, 69 L. Ed. 205; *Lewers and Cooke* v. *Atcherly*, 222 U. S. 285, 56 L. Ed. 202; *Lamb* v. *Cramer*, 285 U. S. 217, 76 L. Ed. 715. The legal effect of the *lis pendens* cannot be ignored in view of the fact the contract between Mosser and Respondent was entered into, not only after bankruptcy, but also after the *lis pendens* had been filed. It placed both Mosser and Respondent on notice petitioner claimed the lands in controversy for the Court of Bankruptcy and notified them of the pendency of the suit. The District Court was vested with jurisdiction for the purpose of determining the issues raised by the pleadings, and none other. Any rights which respondent may have acquired by reason of his contract with Mosser were subject to Mosser's title to the lands and respondent was bound thereby. In determining the effect of a notice of *lis pendens*, the Supreme Court of the State of Arkansas, in the case of *Hobbs* v. *Lenon*, 191 Ark. 509-519, 87 S. W. (2) 6 stated:

> "It follows from the general rule that a person who acquires the property *pendente lite* takes subject

to the court's adjudication of the rights in the property which is the subject-matter of the litigation; such persons will be bound whether a party to the litigation or not. Parties, their privies, and purchasers *pendente lite* are all grouped together as bound by the court's decision, 17 R. C. L., Sec. 28, p. 1031. Also to same effect, 2 Pomeroy's Equity Jurisprudence, 3d ed., pp. 632-635. The rule as above stated had been recognized and followed by this court from its early days to the present time, as the following citations well show: *Whiting* v. *Beebe,* 12 Ark. 564-566; *Holman* v. *Patterson's Heirs,* 29 Ark. 358; *Montgomery* v. *Birge,* 31 Ark. 491; *Hale* v. *Warner,* 36 Ark. 217; *Ritchie* v. *Johnson,* 50 Ark. 551, 8 S. W. 942; *Brown* v. *Bocquin,* 57 Ark. 107, 20 S. W. 813; *Burleson* v. *McDermott,* 57 Ark. 229, 21 S. W. 222; *Boynton* v. *Chicago Mill & Lbr. Co.,* 84 Ark. 214, 105 S. W. 77; *Hudgins* v. *Schultice,* 118 Ark. 144, 175 S. W. 526; *Causey* v. *Wolf,* 135 Ark. 17, 204 S. W. 977; *Bailey* v. *Ford,* 132 Ark. 203, 200 S. W. 797; *Cherry* v. *Dickerson,* 128 Ark. 572, 194 S. W. 690; *Champion* v. *Williams,* 165 Ark. 328, 264 S. W. 972; *Collum* v. *Hervey,* 176 Ark. 714-721, 3 S. W. (2) 993; *Turley* v. *Owen,* 188 Ark. 1072, 69 S. W. (2) 882."

The Respondent was in privy only with Mosser. The contract entered into between Mosser and Respondent could not and did not bind the Petitioner. Respondent's rights could climb no higher, nor could his claim of title be any greater than that of Mosser. Mosser's title fell. Upon payment to Mosser of the amount of his lien, his rights terminated. The orders of the District Court are conclusive on him and on all persons with whom he was in privy. *Litchfield* v. *Crane,* 123 U. S. 549; 31 L. Ed. 199; 28 Am. Jur. P. 505; *Smith* v. *Illinois Bell Telephone Co.,* 270 U. S. 587, 70 L. Ed. 747.

The Court of Appeals stated in its opinion if the action brought by Petitioner was one to recover property in the hands of an adverse claimant, and not an action under either Sections 67 or 70 of the Bankruptcy Act, it was within the jurisdiction of the District Court with the consent of the defendants and without regard to the amount involved or the citizenship of the bankrupts and defendants,

since in this case Mosser answered on the merits and Respondent invoked the jurisdiction of the District Court, the requisite consent of the defendants is apparent (R. 121). The fallacy of this line of reasoning lies in the fact the Federal Courts in a suit by a trustee in bankruptcy have jurisdiction to recover unlawful transfers regardless of citizenship, amount involved or the consent of the defendants. *Rodgers* v. *Bankers Com. Co., Inc.*, 42 F. (2) 906. Mosser is a resident of the State of Texas. He was paid and is out of the case. His lien was transferred to a resident of the State of Arkansas. Respondent added nothing when he intervened. He was not a necessary party to the original bill. Petitioner stands in the shoes of the bankrupts. All parties before the Court are residents of the State of Arkansas. The lands involved are all located within the jurisdiction of the District Court. Respondent could not sue Petitioner for specific performance in the District Court. Aligning Respondent and Petitioner in their proper legal position as residents of the State of Arkansas, the requisite jurisdiction must fail. The rule is the Federal Court does not have jurisdiction unless all parties on one side of the controversy are of a citizenship diverse to all those on the other side. *City of Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 86 L. Ed. 47; *Kendrick* v. *Kendrick*, 16 F. (2) 744; *Johnson* v. *Riverland Levee District*, 117 F. (2) 711.

The Court of Appeals held the District Court had discretion to alter and modify essential parts of the consent decree without the consent of all parties, while at the same time holding that a consent decree has the same force and effect as any other judgment until set aside in the manner provided by law and could not be modified in any essential part without the consent of the parties (R. 122). In our opinion the findings are not consistent. We concede under certain circumstances, after an appropriate hearing, a Federal Court may have jurisdiction to modify a consent decree, particularly, where there is fraud practiced, where the parties were without authority to consent, or where such power was reserved to the Court in the original decree. This is the effect of the opinion of this Court in the recent case of *Howard* v. *United States*, shown at page 281, Advance Opinions of the Supreme Court, Law Edition, Volume 96, dated February 25, 1952.

If there was a binding consent decree entered into by all parties with full authority to act, and if the District Court had jurisdiction both of the parties and the subject matter, the District Court did not act originally, within its jurisdiction and discretion by extending Respondent's time over Petitioner's protest. In so doing the District Court varied from the terms of the express consent entered into by the parties and, in effect, made a new contract. The District Court recognized this by later dismissing the intervention. The Court of Appeals would sanction this action thereby making the Court a party to the breach of contract. This it may not do. *Walling* v. *Miller, et al.*, (C. C. A. 8) 138 F. (2) 629. The question was determined by this court in the case of *Swift & Co.* v. *United States*, 276 U. S. 311, 48 S. Ct. 311, 316; 72 L. Ed. 587, as follows:

> "The decree sought to be vacated was entered with the defendant's consent. Under the English practice a consent decree could not be set aside by appeal or bill of review, except in case of clerical error. (Citing cases.) In this court a somewhat more liberal view has prevailed. Decrees entered by consent have been reviewed upon appeal or bill of review where there was a claim of lack of actual consent to the decree as entered, (*Pacific R. R. Co.* v. *Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *White* v. *Joyce*, 158 U. S. 128, 15 S. Ct. 788, 39 L. Ed. 921); or of fraud in its procurement, (*Thompson* v. *Maxwell Land Grant Co.*, 168 U. S. 451, 18 S. Ct. 121, 42 L. Ed. 539); or that there was lack of Federal jurisdiction because of the citizenship of the parties (*Pacific R. R.* v. *Ketchum, supra*). Compare, *Fraenkl* v. *Cerecedo*, 216 U. S. 295, 30 S. Ct. 322, 54 L. Ed. 486, But 'a decree which appears by the record to have been rendered by consent is always affirmed without considering the merits of the cause.' *Nashville, Chattanooga & St. Louis Railway Co.* v. *United States*, 113 U. S. 261, 5 S. Ct. 460, 28 L. Ed. 971. * * *"

In the case of *Horning* v. *Kendrick, Circuit Judge*, 161 Mich. 413, 126 N. W. 650, the court there stated that a consent decree which involved the payment of a sum of money within a specified time could not be amended by supplemental decree extending the time in the absence of

fraud or mistake and over the protest of the obligee. In the case at bar the element of time allowed in which to complete the purchase is the very essence of the consent agreement so far as Petitioner and Respondent are concerned. If the Court of Appeals could lend its sanction to three successive extensions of time to the Respondent, it could again extend the time for a further period and continue to do so, *ad infinitum*, thus rendering the terms of the consent decree inoperative and a nullity.

The Court of Appeals further stated in its opinion there is no suggestion in the record the consent decree is subject to vacation or modification on any of the grounds set out in Rule 60(b) of the Rules of Civil Procedure (R. 122.) Rule 60(b)(4) provides that the court may relieve a party or his legal representatives from a final judgment that is void. The original decree dated May 24, 1950, was void for want of jurisdiction as to everything other than that title to the lands be vested in Petitioner subject to Mosser's lien. The subsequent orders were also void. A jurisdictional defect which appears from the face of the record can be corrected by the trial court upon its own motion. Such a defect need not be assigned as error. In an equity case, plain error may be, and ought to be considered where the failure to consider it would result in great injustice. *Central Imp. Co.* v. *Cambria Steel Co.*, (C. C. A. 8) 201 Fed. 811.

The decree entered by the trial court on March 7, 1951, dismissed Respondent's intervention (R. 70, 73). The Notice of Appeal from this decree was filed April 3, 1951, and service had on the same day (R. 73). On April 26, 1951, Respondent filed in open court a petition for authority to withdraw the funds tendered into court by both parties "without prejudice to his right to prosecute the appeal" (R. 74.) After a short hearing, the trial court entered an order as requested (R. 75). This order amended the decree entered on March 7, 1951, and is the final order in the case. The finality of judgments for purposes of appeal in Federal Courts is governed by the Statutes of the United States, and the procedure, Rules and decisions of the National Courts. *U. S.* v. *Nordbye, Judge*, (C. C. A. 8) 75 F. (2) 744. The case of *Ray* v. *United States*, (C. C. A. 7) 121

F. (2) 416, disposes of what constitutes a final order. The court there said:

> "We do not agree with appellee that the amendment of March 2 constituted merely the correction of a clerical error. The judgment of January 25 was clearly erroneous in ordering payment of the amount of premiums to the beneficiary and the administratrix of the insured, since only the latter was entitled to recover the amount due, if any. In view of the ruling in *Zimmern* v. *United States*, 298 U. S. 167; 56 S. Ct. 706; 80 L. Ed. 1118, we think there can be no question of the power of the court to correct the judgment whether such correction was necessitated by a clerical error, or one of law. The amended judgment was not entered *nunc pro tunc*, nor was there any reason why it should have been. We are convinced that it was a new judgment from which time for appeal is to be computed. * * *."

The original decree dated May 24, 1950 was clearly erroneous in so far as it went beyond the consent entered into by Petitioner and Mosser in ordering the Petitioner to perform the executory contract. The order allowing Respondent's intervention was erroneous. There can be no question about the power of the District Court to correct it's judgment where such correction was necessary by clerical error or errors of law. The change in the order appealed from was made upon the petition of Respondent. The order permitting Respondent to take down both tenders was not entered *nunc pro tunc*, and was clearly a new judgment. The general rule is that appellate courts have jurisdiction only from judgments which are both final and complete. The judgment appealed from is not the final judgment in the case and the Court of Appeals should not have considered any errors but should have dismissed the appeal. *Oneida Navigation Corp.* v. *W. & S. Job & Co., Inc.*, 252 U. S. 521, 64 L. Ed. 697.

By authority of an order made on December 28, 1950, the Respondent tendered to the clerk of the District Court the balance due under the terms of the extension authorized by the District Court (R. 45-48). This tender was accepted

by the clerk upon verbal instructions received from the District Judge (R. 49). There were no conditions attached to the tender. Petitioner deposited in the registry of the court $39,416.66, which sum of money Petitioner received directly or indirectly by reason of the payments made by Respondent prior to his defaults during the course of this litigation (R. 63). Respondent petitioned for and received, over Appellee's objection, an order authorizing him to withdraw both tenders, without prejudice to his right of appeal from the order dated March 7, 1951 (R. 75). The rule with reference to an unconditional tender made under such circumstances is stated in 52 Am. Jur., Sec. 46, p. 247, as follows:

> "Money which has been tendered and then, without any order of court, deposited in a bank or with a third person, may be withdrawn where there has been no acceptance. But where money tendered is deposited in court, the title thereto is transferred from the tenderer who deposits it to the other party and the court itself has no power to make an order in the same action which in effect re-transfers the title by permitting the debtor to withdraw the money."

The rule in Arkansas is that after a tender is duly made, it must, to preserve its legal effect, be kept good. *Kelly* v. *Keith*, 85 Ark. 30, 106 S. W. 1173. The tender is not sufficient unless kept good by paying the money tendered into the registry of the court, or otherwise. *Abbott* v. *Herron*, 90 Ark. 206, 118 S. W. 708. By withdrawing both tenders the Respondent has accepted all of the benefits of the order of the District Court to which he is entitled. Respondent cannot appeal from those portions of the order unfavorable to him, while accepting the benefits of those portions which are favorable to him. He will not be heard to protest he did not get enough from the trial court, while accepting the benefits to which he may not be entitled. *Harte* v. *Castetter*, 38 Neb. 571, 57 N. W. 381; *McGrew* v. *Kitch*, 41 N. E. 1027; *Coston* v. *Lee Wilson & Co.*, 109 Ark. 548; 160 S. W. 468. The rights of Respondent depend upon his tender. Proper procedure demanded that he leave the money undisturbed while taking an appeal. Withdrawal was not necessary to any issue involved on appeal.

Spratt v. *Spratt,* 140 Minn. 510, 166 N. W. 769. The acceptance of these benefits by Respondent bars his appeal.

Nor does the attempted reservation of the right to appeal, as set out in Respondent's petition and the order thereon (R. 74, 75), while accepting the benefits of the judgment, become effective, since the rights are not divisible. *Coston* v. *Lee Wilson & Co.,* 109 Ark. 548, 160 S. W. 468. *Flowers* v. *Hughes,* 46 La. Anno. 436, 15 So. 14; *City of Seattle* v. *Libermann,* 9 Wash. 276, 37 Pac. 433; *Mastin* v. *May,* 130 Minn. 281, 153 N. W. 756.

In the case of *Credit Bureau of San Diego, Inc.* v. *Petrasich, et al.,* 118 Fed. (2) 470, the Court of Appeals for the 9th Circuit held that a corporation which was a party to an interpleader action wherein a judgment was entered in two parts, awarding part of the funds in controversy to the corporation and enjoining the corporation from attempting to collect a State Court judgment, could not appeal from that part of the judgment respecting the injunction where the corporation voluntarily accepted and retained the amount awarded it under the other part of the judgment.

The record shows the Respondent borrowed the money used in making the tender and the lender demanded repayment that day. This was the reason assigned when Respondent asked the District Court to immediately pass on the motion permitting him to withdraw the funds (R. 92). The rule is that where money is borrowed for the purpose of making a tender, and upon its being refused, the money is returned to the lender, the tender is not kept good. *Park* v. *Wiley,* 67 Ala. 310; *Middle State Loan* v. *Hagerstown Mattress & Upholstery Co.,* 33 A. 886. Respondent has withdrawn every penny tendered into court for his benefit, and has withdrawn the tender he made. Petitioner respectfully contends Respondent cannot eat his cake and have it also. The case is at an end. Appeals will not be entertained to determine moot questions. *Selected Products Corp.* v. *Humphrey,* 86 Fed. (2) 821; *Wynne* v. *Union City Brewing Co.,* 59 F. (2) 733.

We are of the opinion the learned Court of Appeals overlooked the effect of the provisions of Section 67(d)(4)

(6) and Section 70(a) of the Bankruptcy Act (11 U. S. C. A. Secs. 107, 110.) The title to the lands in controversy vested in the Petitioner by operation of law. All questions respecting possession were resolved between Mosser and Petitioner by the consent decree of May 24, 1950. Respondent thereafter could not have obtained any title by reason of his contractual relations with Mosser. It follows the only jurisdiction as respects the lands in controversy, or the possession thereof, was vested exclusively in the Court of Bankruptcy. The first and fundamental question confronting every court is that of jurisdiction, first of the appellate court and then of the court from which the record comes. *Highway Construction Co.* v. *McClelland,* (C. C. A. 8) 14 Fed. (2) 406. The rule as stated in 14 Am. Jur., Sec. 191, at page 385, is as follows:

> "Where judicial tribunals have no jurisdiction of the subject-matter on which they assume to act, their proceedings are absolutely void in the strictest sense of the term; and a court which is competent to decide on its own jurisdiction in a given case may determine that question at any time in the proceeding of the cause, whenever that fact is made to appear to its satisfaction, either before or after judgment. Accordingly, an objection for want of jurisdiction, if it exists, may be raised by answer or at any subsequent stage of the proceedings; in fact, it may be raised for the first time on appeal. A court will recognize want of jurisdiction over the subject-matter even if no objection is made. Therefore, when want of jurisdiction is suggested by the court's examination of the case or otherwise, it is the duty of the court to consider it, for if the court is without jurisdiction it is powerless to act in the case."

It is not possible for parties litigant, by consent, to confer jurisdiction of the subject-matter upon a court over which it otherwise would not have jurisdiction. Jurisdiction is prescribed by law and can neither be increased nor diminished by consent of the parties. They may not barter away their substantial rights. This is particularly true as to a trustee in bankruptcy. He is an arm of the court and can act only upon orders of the court. Transfers by a trustee

in bankruptcy without legal authority cannot destroy the court's possession of the property transferred, Nor can the court's possession or jurisdiction be affected by waiver, estoppel or laches. *In Re Shermerhorn,* (C. C. A. 8) 145 Fed. 341; *Chicago, R. I. & P. Ry. Co.* v. *City of Owatonna* (C. C. A. 8) 120 F. (2) 226; *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 733, 51 S. Ct. 270, 75 L. Ed. 645. The petitioner was without authority of the court of bankruptcy to consent to anything with respondent, and any consent he may have entered into did not deprive that court of its jurisdiction or possession over the lands in controversy.

Upon the filing of the petition in bankruptcy the jurisdiction of that court became paramount and exclusive and, thereafter, that court's possession and control over the lands could not be affected by proceedings in any other court. The purpose of the Bankruptcy Act is to hold the property of a bankrupt estate intact for the benefit of all creditors. Every person is forbidden to deal with or receive any property belonging to a bankrupt estate after the filing of the petition, with intent to defeat the purposes of the Act. *Acme Harvester Co.* v. *Beekman Lumber Co.,* 222 U. S. 300, 56 L. Ed. 208. Mosser had no power to sell the lands belonging to the bankrupts. With the filing of the petition in bankruptcy, whatever power he may have had ceased. Thereafter, the lands were held by Mosser for the Court of Bankruptcy. The contract entered into between Mosser and Respondent is a nullity.

A motion to dismiss the appeal is the appropriate remedy when the court is without jurisdiction. *Murphy* v. *Elms Hotel,* 104 Conn. 351, 133 A. 106; *Kennedy, et al.* v. *Bethlehem Steel Co.,* (C. C. A. 3) 102 F. (2) 141. Courts do not hesitate to dismiss an appeal where it is apparent there is no jurisdiction. *Hunter* v. *Federal Life Ins. Co.,* (C. C. A. 8) 103 F. (2) 192.

After bankruptcy and reference of the proceedings to the Referee, the Referee is the court for the purpose of granting an order to sell, and the District Court sitting in Equity, is without jurisdiction. *In Re Styer,* (D. C. Pa.) 98 Fed. 290; *In Re Fisher & Co.,* 135 Fed. 223; *In Re New England Lumber Co.,* 17 F. (2) 379.

For the reasons shown, Petitioner respectfully submits that the action of the Court of Appeals for the Eighth Circuit in reversing the decree of the District Court has deprived the court of bankruptcy of its proper jurisdiction; that the ruling of the Court of Appeals for the Eighth Circuit is in conflict with its own rulings and with the rulings of other Circuit Courts of Appeal as shown; and that the ruling is in conflict with prior decisions of this Honorable Court. For all of these reasons, Petitioner respectfully prays that this Honorable Court grant a Writ of Certiorari whereby this Court can accept, review and determine this controversy.

Respectfully submitted,

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FILED
MAY 5 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

NUMBER 686

W. E. MOSS, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF LEON S. HORNE AND NELL HORNE, DOING BUSINESS AS STAR CITY LUMBER COMPANY ..... *Petitioner*

vs.

W. D. MAY ..... *Respondent*

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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CENTRAL PRINTING CO., LITTLE ROCK

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Richards v. Combest, 208 S.W. 2d 392—Texas Civil Court of Appeals.

IN THE

Supreme Court of the United States

NUMBER 686

W. E. MOSS, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF LEON S. HORNE AND NELL HORNE, DOING BUSINESS AS STAR CITY LUMBER COMPANY ..... *Petitioner*

VS.

W. D. MAY ..... *Respondent*

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's statement of the case, we think, needs clarification. The facts are:

(1) A Receiver in bankruptcy sued H. J. Mosser in the federal equity court,* the prosecution of the suit being continued by the bankruptcy Trustee, after his appointment. In the suit the Receiver alleged that though Mosser claimed title to 3,800 acres of land, and held a deed thereto, his interest was really that of a mortgagee; and the object of the suit was to have the land, subject to Mosser's alleged lien, declared an asset of the bankruptcy estate. Plaintiff

*The district court below exercised some jurisdiction in respect to the land involved in this litigation both in its bankruptcy capacity and in the adjudication of the equity proceeding which was appealed to the Court of Appeals. In this brief we will refer to the court from which such appeal was taken as the "federal equity court".

alleged that he was proceeding under Sections 67 and 70 of the Bankruptcy Act. (R. 7, 8)

(2) When the case came up for trial on May 23, 1950, W. D. May (respondent here) appeared and orally intervened. He alleged that defendant Mosser had contracted during the pendency of the litigation, to sell the land to May for $125,000 (of which $5,000 had been paid in cash); and he asked that his contract be specifically enforced. (R. 22 *et seq.*)

(3) At the May 23 hearing, after considerable discussion (R. 22-30) between court and counsel it was agreed that May should be permitted to intervene (R. 30); and a consent decree (R. 16) was entered, the effect of which was:

(a) In lieu of absolute ownership, defendant, Mosser, was given $76,250* lien on the land.

(b) Title to the land was vested in the Trustee in bankruptcy subject to this lien.

(c) The Trustee's title was also decreed to be subject to the effect of May's executory purchase contract; and the Trustee was ordered to perform this contract. In other words, the specific performance of the contract was decreed.

(d) In connection with the specific performance of the contract, the Trustee was ordered to meet the title requirements made by May's attorney; and May was given 30 days "to conclude the purchase . . . provided said title requirements have been met . . . by pay-

*Reduced to $71,250 because of the down-payment May had made.

ing to the said W. E. Moss, Trustee in Bankruptcy, the sum of $120,000 cash." (R. 17)

4. This consent decree was entered as of May 24, 1950 (R. 16). Due to his appearance at the trial both in person (R. 27) and by attorney (R. 22), May was treated in the decree as an intervenor and was awarded relief in that capacity; a copy of his contract being attached to the decree. (R. 17, 19) May's formal written intervention was filed May 31, 1950. (R. 31)

(5) Opposing counsel states (Brief, Page 15) that the Trustee's counsel opposed May's intervention. True, he did initially register an objection (R. 22, 23); but an analysis of the colloquy between court and counsel (R. 22-30) indicates that ultimately the filing of the intervention may have been a matter of consent. Mosser's attorney felt that a determination of May's claim was necessary for the protection of Mosser (R. 25); and the Trustee's counsel made statements (R. 24, 26, 28) of similar nature.

(6) On June 22, 1950, the court by its order (R. 32) gave May an additional ten days to complete the purchase, requiring him as a condition to this extension to pay $72.23 interest and to waive all further title requirements. The order presupposes that the title requirements had not been met by the Trustee; therefore opposing counsel presumably is not correct in saying (Brief, Page 16) that on June 22 May had "defaulted under the consent decree."

(7) On July 3, 1950, May sought additional time to pay the purchase price under his contract with Mosser; therefore, an order (R. 33) was entered declaring among other things:

(a) The original contract between May and Mosser was declared to be "cancelled and set aside and forever held for naught" (R. 33); and the court decreed May's right to purchase the land under revised terms which included a $20,000 increase in the purchase price ($10,000 of which was concurrently paid by May in cash) and a further extension of the time for payment. The decree ordered the Trustee and Moss to execute a new contract evidencing the revision of terms set out in the decree; and this contract was executed (R. 37). While going through the gesture of cancelling the May-Mosser contract and creating a new one, the actual effect of the decree was to sustain May's rights as vendee under his contract with Mosser, subject to adjustments deemed equitable both to May and the Trustee.

(b) Under said decree, May was required to pay off Mosser's $71,250 lien on or before July 23, 1950; but he was permitted to do this by procuring a loan—the lien of Mosser to be transferred to the lender so as to secure the loan (R. 33, 35).

(c) The decree and accompanying contract provided conditions under which May, prior to the payment of the purchase price, might cut timber from the land in controversy. It was not obligatory that he cut any timber; but, if he did do so, May was required to make payments on his purchase money obligation calculated on a stumpage basis, at the rate of not less than $21,666 per month, to be applied first to the discharge of the $71,250 lien, and next on the $58,750 (or balance of the purchase price) due the Trus-

tee (R. 40-41, 34-35). The decree and accompanying contract are not entirely clear as to when May's payments are due if he did not elect to cut timber from the land. See the final paragraph of this statement of facts.

(8) After the July 3 decree May, as required in the decree, procured a loan the proceeds of which were used in paying off Mosser's lien; Mosser's lien being transferred to the new lender. (R. 68, 69, 71)

(9) After the July 3 decree, and prior to the hearing of December 8, May paid approximately $29,000 in reduction of the newly created lien above mentioned—which payment increased the value of the Trustee's equity in the land. May not having elected to go on the land and cut timber as permitted under the July 3 decree, he made no payments direct to the Trustee in the interim above mentioned.

(10) On December 30, 1950, pursuant to a hearing on December 28, the court entered an order giving May four days in which to complete the purchase. (R. 45) Within the four day period, May paid to the Clerk of the Court $102,679.22 (R. 49), being the entire unpaid purchase price balance. The total amount paid by May to, or for the account of, the Trustee was $142,218.02. See decree of March 7, 1950. (R. 70)

(11) Having made such full payment, May filed a petition asking that title be vested in him. (R. 49) The Trustee filed a petition in opposition, asking the court to nullify the order granting the four day extension. (R. 50, 51)

(12) On February 16, 1951, the court handed down an opinion which contained a finding that all action thereto-

fore taken by the court on May's intervention was in excess of its jurisdiction—being a usurpation by a federal equity court of bankruptcy jurisdiction. (R. 60) May's counsel presented a motion for rehearing (R. 63) which was over-ruled; whereupon the court entered the order appealed from (R. 70) dismissing May's intervention and all proceedings thereon.

(13) Notice of appeal having been filed by May, the district court entered an order (R. 75) permitting May to take down, without prejudice to his right of appeal, the funds theretofore deposited on account of his purchase.

(14) On appeal the Court of Appeals reversed the order appealed from, sustaining the federal equity court's jurisdiction in respect to May's intervention.

When, jurisdictional questions having been settled, the case comes up before the district court on the merits, there will be an issue as to whether May was really in default at the time the court gave him the four-day extension on December 28th (R. 45). The order of July 3, and the contract concurrently executed, are not entirely clear on this point; and the order of July 3 provides that in no event will "the payments to the first lien holder and the trustee be extended to a day in excess of six and one-half months". (R. 36) This contemplated no extensions to a date beyond January 23, 1951; and May paid in full three weeks before this date arrived.

ARGUMENT

(a)

The District Court properly admitted Respondent May to the case as an Intervenor.

In *Cline* v. *Kaplan,* 323 U. S. 97, 98, the Court said:

> "A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the Court. *Thompson* v. *Magnolia Co.,* 309 U. S. 478, 481. If the property is not in the court's possession and a third person asserts a *bona fide* claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto'. *Galbraith* v. *Vallely,* 256 U. S. 46, 50; *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426."

When the Star City Lumber Company bankruptcy petition was filed, legal title to the land in controversy admittedly was vested in Mosser. All the Trustee claimed was an equitable title, which he sought to establish by parol evidence. The land being a wild timber tract,* presumably the constructive possession followed the legal title. *St. Louis Refrigerator & Wooden Gutter Co.* v. *Thornton,* 74 Ark. 383, 86 S. W. 852. Most certainly, the bankruptcy estate had no possession, actual or constructive, at the time suit was filed against Mosser.

Therefore, in his attempt to have Mosser's title decreed to be that of Mortgagee, the Trustee's counsel properly filed a plenary proceeding in the federal equity court under Section 23 of the Bankruptcy Act.

*Admitted at Page 20 of opposing counsel's brief.

When a Trustee in bankruptcy sues in an equity court, he must be prepared to submit to the customary incidents of the jurisdiction so invoked. *Ohio Oil Co. v. Thompson,* 120 Fed. 2d (C.C.A. 8) 831, 836; *Sherman* v. *Buckley,* 119 Fed. 2d 280 (Cert. denied 314 U. S. 657); *In re Cup Craft Paper Corp.,* 40 Fed. Supp. 927; *Erie R. Co.* v. *Pfeil, Inc.,* 11 N. Y. S. 2d 155; *Collier on Bankruptcy,* 14th ed., Vol. 1, Page 158.

An incident to equity jurisdiction is the right, in a proper case, of a third party to intervene.

When this suit came on for trial on May 23, 1950, respondent May appeared in person and by counsel and sought relief by way of intervention. (R. 22 *et seq.*) The situation was appropriate for an intervention by May. In the suit, the Trustee challenged the title of the record owner, Mosser. But May held an executory contract to buy the land from Mosser. If Mosser's title failed, May's title would fail; and it was appropriate that May should intervene and assert his interest in the land.

True, May's citizenship was the same as that of the plaintiff Trustee in Bankruptcy; but where the subject matter of the intervention is truly ancillary to the cause stated in the complaint, the diversity which supports the principal action will support jurisdiction over the intervention. *Morgan Co.* v. *Texas Central Railroad & Steamship Co., et al,* 137 U. S. 171, 201; *Central Trust Co.* v. *Bridges,* 57 Fed. (C.C.A. 6th) 753, 762. See also *Johnson* v. *Riverland Levee Dist.,* 117 Fed. 2d (C.C.A. 8th) 711, and authorities cited in Annotation, 134 A. L. R., at Page 337.

A typical case where the intervention is truly ancillary would exist when a third party intervenes to claim an

interest in a fund in court. Failing to intervene, the third party may lose his last chance to participate in that fund; and he is permitted, in such a case, to intervene in a federal district court regardless of his citizenship.

But May's position in respect to the land in controversy bore some analogy to the position of a third party who asserts an interest in a fund in court. May was a purchaser *lis pendens*—a fact admitted by counsel for respondent. (Brief, Page 2). Therefore, failing to establish his rights as purchaser by intervention in this equity suit, he could never thereafter litigate his claim against the Trustee in any other Proceeding. *Section* 27-501, *Arkansas Statutes* (1947) *Annotated; Mitchell* v. *Federal Land Bank of St. Louis,* 174 S. W. 2d (Ark.) 671, 675.

See *Gaines* v. *Clarke,* 275 Fed. (C.C.A. Dist. Col.) 1017, 1020, cited by a leading text as authority for the proposition that a purchaser *lis pendens* has an absolute right to intervene. *Moore's Federal Procedure,* 2nd Ed., Vol. 4, Section 24.09. As sustaining the right of a purchaser *lis pendens* to intervene, see also *Deauville Associates, Inc.,* v. *Eristavi-Tchitcherine et al,* 173 Fed. 2d (C.C.A. 5th) 745, 746. This last decision was clarified in *Deauville Associates, Inc.,* v. *Murrell et al,* 180 Fed. 2d 275, by the statement that the right to intervene did not include the right to re-litigate matters decided before the intervention. See also *Dutcher et al,* v. *Haines City Estates, Inc., et al,* 26 Fed. 2d (C.C.A. 5th) 669.

To have denied May the right to intervene would have subjected him to the possibility of a collusive settlement between Mosser and the Trustee, which settlement would have been binding on May as a purchaser *lis pendens.* In

that connection, note that May's purchase contract recites that it is subject to the suit; and if title fails Mosser is liable merely to refund to May the $5,000 down payment. (R. 20) One ground for intervention exists when a third party's representation in the suit by other parties is or may be inadequate. District Court Rule 24(a).

But May having appeared at the trial, and asserted his rights, it seems to us that Mosser's counsel, the Trustee's counsel and the court all joined in recognizing that May's admission as intervenor was expedient. Mosser's counsel frankly stated his anxiety over the effect of any consent decree that didn't adjudicate May's rights. The Trustee's attorney seemed to share the same view: Addressing May's attorney, he said:

> ". . . We don't want to allow you to walk out of here and file another suit against Mosser. That isn't fair." (R. 28; and see similar statements at R. 24, 26)

May's right to intervene was of a permissive nature; and his intervention was properly permitted.

(b)

The Petitioner's argument as to the possession of the res.

Petitioner's counsel seems to argue that while the district court admittedly had jurisdiction of the suit filed by the Trustee against Mosser, once the court entered the tripartite consent decree adjudicating the claims of the Trustee, Mosser and May, the court thereupon ceased to have any further jurisdiction as to May's claim. Counsel seems to argue that in the very entry of a decree designed, among

other things, to give May relief the court destroyed its power to grant him relief!

Counsel's theory is that the portion of the consent decree transferring Mosser's title to the Trustee, operated to vest in the Trustee both the title to, and resultant constructive possession of, the land so that after this judicial transfer the Bankruptcy Court's jurisdiction over the land was exclusive of all other courts—even to the extent of nullifying the other portion of the same decree in which the court gave May the remedy of specific performance as against the Trustee.

When the Trustee sued in the federal equity court, an incident to the equity jurisdiction was the right to admit May as an intervenor. Another incident was the familiar right of an equity court to retain jurisdiction for the purpose of completely adjudicating the rights of all parties in respect to the subject matter of the suit. *United States* v. *Ash Sheep Co.*, 250 Fed. (C.C.A. 9) 592, affirmed 252 U. S. 159; *In re Blake*, 150 Fed. (C.C.A. 8) 279. Under the consent decree, title was transferred from Mosser to the Trustee; but it was transferred *subject to May's rights as purchaser under his executory contract*, May being treated as an intervenor and a copy of his contract being attached to the decree.* Having transferred the property to the Trustee subject to the simultaneously adjudicated rights of an intervening party, it is ridiculous to say that the district court had no right to retain jurisdiction to enforce the rights of such intervenor. Moreover, counsel's argument

*It may seem anomalous that the May 24 decree limited Mosser's title to that of Mortgagee and simultaneously charged the Trustee's title with May's rights as vendee. But on this review we deal not with the merits but with jurisdictional aspects. If the Trustee, weighing his chances of prevailing over Mosser, was willing to consent to a decree on this basis, certainly no jurisdictional question would arise.

overlooks the fact that in such a situation the federal equity court is in reality a bankruptcy court (*McDonald* v. *Plymouth County Trust Co.*, 286 U. S. 263, 266), a point stressed by the Court of appeals in this case.

As envisioned by petitioner's counsel, the consent decree, so far as May is concerned, was an entrapment. May was induced to consent to a judicial divestiture of his vendor's title in exchange for a decree of specific performance which was void!

(c)

The relief the Court sought to give May came within its jurisdiction to grant specific performance.

In the May 23 decree, the court vested Mosser's title in the Trustee subject to May's rights as purchaser under his executory sale contract; and the decree ordered the specific performance of said contract as against this transferee whose newly acquired title was encumbered thereby. Thus the court granted May true equitable relief within the jurisdiction of an equity court.

Equity may extend leniency to a vendee who has not made timely payments under a sale contract. *Texas Company* v. *Pensacola Maritime Corporation*, 279 Fed. (C.C.A. 5) 19, 27.

True the order of July 3 (R. 33) resembled in some aspects the authorization of a sale *de novo*. It is prefaced with a declaration that the contract between Mosser and May is cancelled and set aside, after which the court directs a sale to May under terms which included a further extension of maturities and an increase of purchase price—the sum of $10,000 (representing half the increase) having been paid

by May in cash when the order was entered. And the July 3 order directed the execution of a new written contract between May and the Trustee. (R. 37)

But in the last analysis, all the challenged orders of the district court (including the July 3 order) are bottomed on the Mosser-May contract; and the various extensions to May, for one of which he paid $10,000 in cash, represented the indulgences an equity court in specific performance may extend to a vendee who has not made timely payments.

If the federal equity court had ordered a judicial sale of this land motivated primarily by the purpose of raising funds for the bankruptcy creditors, this would have been an encroachment on bankruptcy jurisdiction. But obviously the challenged orders did not represent an effort of an equity court to take over the liquidation of a bankruptcy estate. Each of these orders was entered at the instance of May, and to enforce his rights originating under the Mosser-May contract; and each order was within the jurisdiction of the court to grant specific performance.

It is pertinent to note that the bankruptcy court acquiesced in the jurisdiction of the federal equity court. (R. 68-70)

(d)

As a matter of fact, the bankruptcy Trustee was utilizing the machinery of the federal equity court, to wash out the equitable title of May.

In Arkansas an executory sale contract places the equitable title in the vendee. *Stubbs* v. *Pitts,* 84 Ark. 160, 104 S. W. 1110; *Robertson* v. *Read,* 52 Ark. 381, 14 S. W. 387.

A proper method of terminating the rights of such a vendee is by an equity foreclosure—the same as foreclosing a mortgage. *State Bank of Decatur* v. *Sanders,* 114 Ark. 440, 170 S. W. 86; *Strauss* v. *White,* 66 Ark. 167, 51 S. W. 64.

The challenged order of December 28 provides that if May does not pay the balance of the purchase price in four days, the land shall be sold at public auction, which sale "shall constitute a permanent bar to all right of redemption by the intervenor, W. D. May", etc. (R. 47) At the end of this order appears the initials "ddp"—indicating that the Trustee's attorney drafted the order.

Under Section 23 of the Bankruptcy Act, even though no diversity exists, the federal equity court may retain jurisdiction over a suit brought by the Trustee if the defendant does not challenge the jurisdiction. *Schumacher* v. *Beeler,* 293 U. S. 367.

It is obvious that in drafting the order of December 28 the Trustee's attorney was utilizing the machinery of the federal equity court to foreclose and forever wash out May's claim. Unless May paid in four days, then there was to be a public sale which would forever bar him. To this extent, therefore, the Trustee assumed the role of a plaintiff, and should be realigned as such; therefore, since May acquiesced with the Trustee in the jurisdiction to enter the order, it would seem the jurisdiction was established under Section 23.

(e)

The withdrawal from court of the deposited funds.

As a litigant seeking specific performance, May could

not lawfully be required to pay the purchase money in court prior to the entry of specific performance decree. A plaintiff in specific performance is not required to start his suit with a tender. It is sufficient that he alleges his willingness and ability to pay the purchase price. *Cheney* v. *Libby,* 134 U. S. 68, 83; *Bateman* v. *Hopkins,* 73 S. E. (N. Car.) 133, Ann. Cas. 1913 C, Page 642; *Brewster Coop. Growers* v. *Brewster Orchard Corp.,* 150 Pac. 2d (Wash.) 847.

The Trustee in bankruptcy had refused to accept the deposited funds. A litigant is not required to go through the vain gesture of tendering funds to an adversary who has announced his unwillingness to accept them. *Reeds Drug Store* v. *Hessig Ellis Drug Co.,* 93 Ark. 497, 125 S. W. 434.

What useful purpose could have been served in requiring May to maintain in the registry of the court, during appeal, a large sum the Trustee refused to accept?

Opposing counsel fail to distinguish between a conditional tender and an unconditional tender. Where a litigant deposits money in court as a condition precedent to the enforcement of an asserted right to affirmative relief, if rejected the funds may be withdrawn. *52 American Jurisprudence,* Page 248, Sections 46 and 47.

For cases sustaining the right of withdrawal in similar situations see: *Wright* v. *Young,* 70 Am. Dec. 453, 6 Wis. 127; *Richards* v. *Combest,* 208 S. W. 2d 392—Texas Civil Court of Appeals.

The petition for certiorari should be denied.

Respectfully submitted,

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